United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF

74-1587

UNITED STATES COURT OF APPEALS
For the Second Circuit

MICHAEL MEEROPOL and ROBERT MEEROPOL,	:	B P/S
Plaintiffs-Appellants,	:	
-against-	:	Docket No. 74-1587
LOUIS NIZER and DOUBLEDAY & COMPANY, INC.,	:	
Defendants-Appellees,	:	
-and-	:	
FAWCETT PUBLICATIONS, INC.,	:	
Defendant-Intervenor-Appellee.	:	

APPELLEES' SUPPLEMENTAL BRIEF

SATTERLEE & STEPHENS
277 PARK AVENUE
NEW YORK, N. Y. 10017

UNITED STATES COURT OF APPEALS
For the Second Circuit

MICHAEL MEEROPOL and ROBERT MEEROPOL,	:	
Plaintiffs-Appellants,	:	
-against-	:	Docket No. 74-1587
LOUIS NIZER and DOUBLEDAY & COMPANY, INC.,	:	
Defendants-Appellees,	:	
-and-	:	
FAWCETT PUBLICATIONS, INC.,	:	
Defendant-Intervenor-Appellee.	:	

APPELLEES' SUPPLEMENTAL BRIEF

This supplemental brief is submitted by appellees* pursuant to a request made by this Court at oral argument of the appeal on August 16, 1974. It discusses whether the order enjoining the prosecution of the Connecticut action (the order appealed from) should be voided because, in the first instance, the order to show cause, with temporary restraining order, was brought on by Fawcett, a non-party to the New York action at that time.

---

* All abbreviations will be the same as those in appellees' main brief.

Initially, it was and is appellees' position that appellants' contention in this regard is a desperate attempt to give some credibitlity to a totally meritless appeal (B* 14-15). As the Court below properly held, it made no difference whether Fawcett was a party because, by reason of its right to indemnity, Fawcett and Doubleday were in privity. The order to show cause with temporary restraining order was signed on March 19, 1974. On March 20, 1974, two days prior to the return date of the motion for the preliminary injunction, Doubleday, a party to the New York action, formally joined the application for the preliminary injunction so that any "technical defect" was cured within twenty-four hours (A-88).

Furthermore, the order to show cause and the temporary restraining order dated March 19, 1974 are not the orders which are being appealed from. Indeed, these orders are clearly not appealable. What is being appealed from is the permanent stay of the Connecticut action -- an order obtained by both Fawcett and Doubleday (A 7-9, 130).

Moreover, appellants have not and can not be prejudiced by this procedure, especially since they knew as early as December, 1973 that the same attorneys representing Doubleday would be representing Fawcett in defending any claims made by appellants

---

* B refers to references in the brief for defendant appellees.

arising from the publication of THE IMPLOSION CONSPIRACY. The two reasons appellants contend they have been prejudiced are discussed fully in appellees' main brief (B 17-20). As to the first contention, suffice it to say that the New York Court had already determined that a preliminary injunction should not issue against any paperback edition of the book so that appellants could not be prejudiced by a decision which denied them an opportunity to relitigate that issue a second time.

With respect to their second contention, at oral argument of this appeal, appellants' attorney repeatedly stated that the stay of the Connecticut action denied appellants their right to a jury trial against Fawcett. This can only be termed as a deliberate attempt to mislead this Court. Attached hereto as Exhibit A is a memorandum decision of Judge Tyler dated June 27, 1974, which specifically discusses appellants' right to a jury trial in New York against Fawcett. In this decision, Judge Tyler states:

> "Although plaintiffs have introduced a timely demand for jury trial as against Fawcett, Rule 38(b), F.R. Civ. P., that demand is premature. Plaintiffs' counsel has failed to define the issues as to Fawcett by the filing of a supplemental complaint, as suggested by this Court's order on April 3, 1974." (p. 4)

Thus, appellants have not been denied the right to a jury trial against Fawcett by reason of the stay of the Connecticut action. Their contention, in the face of Judge Tyler's decision (Exhibit A) and their own refusal to file a supplemental complaint, is nothing more than an attempt on this appeal to contrive some prejudice, which in fact does not exist.

POINT I

THE PRELIMINARY INJUNCTION STAYING THE CONNECTICUT ACTION SHOULD NOT BE VACATED MERELY BECAUSE THE ORIGINAL ORDER TO SHOW CAUSE WHICH BROUGHT ON THE APPLICATION WAS MADE BY FAWCETT, NOT A PARTY TO THE NEW YORK ACTION AT THAT TIME.

It cannot be disputed that one not a party to an action, but whose rights will be affected by that action, may move to intervene in that action in order to protect its interests. This is specifically provided in the Federal Rules of Civil Procedure 24(a), which states in relevant part:

> "INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . ."

As stated above, Fawcett was in privity with Doubleday because of its right to indemnification. Any judgment or decision rendered in the New York action would affect Fawcett even though Fawcett was not at the time formally a party. The reverse would be true as to Doubleday and Nizer in the Connecticut action in which they were not named as parties. (See, e.g., Jones v. Conig, 212 F.2d 187 (6th Cir. 1954)). It is equally clear that one who is not a party to an action whose rights will be affected by the action can move to intervene and has standing to request injunctive relief. (See, e.g., Gilmore v. James, 274 F. Supp. 75 at 88 (N.Y. Texas 1967), aff'd 88 S. Ct. 695 (1968)).

Indeed, this was the precise procedure followed in two cases cited in the main brief of both parties, Cresta Blanca Wine Co., Inc. v. Eastern Wine Corporation, 143 F.2d 1012 (2d Cir. 1944) and International Nickel Co. Inc. v. Ford Motor Company, 108 F.Supp. 833 (S.D.N.Y. 1952). Although there was no discussion of the procedure employed, in both of these cases defendants in a second action who were not parties to the first action moved in the first action to intervene and to stay the second action. While it is true that in both cases stays were denied, this resulted from the particular facts of each case and had nothing to do with the procedure employed to obtain the stay. Moreover, it

must be emphasized that in both cases the parties that moved to intervene in the first action were not parties to that action since intervention had not yet been granted. Neither court was concerned with the fact that defendants were not formal parties to the actions in deciding whether or not to issue a stay.

In substance, the procedure followed in Cresta Blanca and International Nickel, supra, was precisely the procedure employed with respect to the original order to show cause in this case. Although Fawcett did not formally move to intervene in the original order to show cause, it did specifically agree in its moving affidavit to consent to the jurisdiction of the New York court and accept service of a supplemental complaint naming it as a defendant (A-53). This offer was tantamount to a motion to intervene and therefore Fawcett was simultaneously moving to stay and to intervene. In view of authority cited above, the original order to show cause brought on in the name of Fawcett was not technically defective.

Furthermore, analogous authority exists to the effect that one who is in privity with a party, but is not himself a party to the action, may obtain injunctive relief in that action. For example, Federal Rules of Civil Procedure 65(d), provides in relevant part that a restraining order and injunction:

> ". . . is binding upon the parties to the action, their officers, agent, servants, employees, and attorneys and upon those persons in active concert or participation with them. . . " (emphasis added)

This section has been interpreted to mean that an injunction is binding upon the party and those who are in privity with him. (See, e.g., 7 Moore's Federal Practice, ¶65.13.) Since Fawcett, being in privity with Doubleday, would have been bound by an injunction issued by the New York Court even though it was not a party to that action, it follows (and would appear to be the clear intent of the statute) that one who was in privity with a party but himself not a party to the action should be able to apply in that action for injunctive relief when his rights are being affected.

Also, in Grove Press, Inc. v. City of Philadelphia, 300 F.Supp. 281 (E.D. Penn. 1969), aff'd 418 F.2d 82 (3rd Cir. 1969), an importer and national distributor of a film, who was not a party to a State Court suit by a city against the owners and operators of theatres which were exhibiting the film, was held to have standing to maintain a federal action which sought to enjoin the city from further prosecution of the State Court action against the owners of the theatres. Similarly, in New American Library of World Literature v. Allen, 114 F.Supp. 823 (N.D. Ohio 1953),

a publisher was permitted to maintain an action to enjoin an allegedly unlawful suppression of the distribution and sale of its books, even though the threatened arrest and prosecution for violation of a city ordinance by which such suppression was accomplished was directed against a local distributor and not against the publisher itself.

Finally with respect to analogous authority, a whole body of law has been developed in regard to the res judicata and/or collateral estoppel effect of judgments in recognition of the participition of non-parties in actions in which their rights are affected. (See, 1B Moore's Federal Practice ¶0.411[6]). It has been held to be especially appropriate to bind a non-party by a judgment rendered in an action when the non-party is in privity with a party by virtue of an indemnification agreement between them. (See, e.g., Western Electric Co. v. Hammond, 135 F.2d 283 (1st Cir. 1943); Bros, Inc. v. W.E. Grace Mfg. Co., 261 F.2d 428 (5th Cir. 1958)). This is, of course, the situation in the instant action.

However, even if the original order to show cause brought on for a twenty-four hour period only in the name of a then non-party was technically defective, this Court as a matter of law should not reverse the preliminary injunction staying the

Connecticut action which is the order presently being appealed. This is quite simply because appellants have not in any manner been prejudiced by the procedure employed in the original order to show cause and, in fact, as has been previously pointed out, they have not been legitimately prejudiced by the stay of the Connecticut action itself.

It is Hornbook law which requires no citation of authority that mere technical errors not affecting parties substantial rights are insufficient to warrant a reversal by an appellate court. Thus, the usual principles as to harmless error apply to appeals from injunction orders and deviations from proper procedure will be disregarded when non-rejudicial. (See, e.g., Swift v. Black Panther Oil & Gas Co., 244 F. 20 (8th Cir. 1917); In re Lustron Corp., 184 F.2d 789 (7th Cir. 1950); Urban v. Knapp Brothers Mfg. Co., 217 F.2d 810 (7th Cir. 1954), cert. denied 349 U.S. 930 (1955); 7 Moore's Federal Practice, ¶65.21)).

Also, since appellants have not been prejudiced in any manner by the stay of the Connecticut action, the issues involved in this appeal have become moot and therefore the order of the Court below should be affirmed on this principle as well. (See, e.g., 6 Moore's Federal Practice, ¶57.13).

In short, by virtue of the stay of the Connecticut action and Fawcett's intervention in the New York action, the New York court now has before it all interested parties and the opportunity to dispose of all issues between these parties in one action. It cannot be disputed, and even appellants have not expressed serious disagreement with this, that it would represent a colossal waste of judicial time and effort if the conduct of identical proceedings was permitted to proceed in two fora. This is especially true if this Court were to reverse the stay of the Connecticut action merely on the technical grounds that the order to show cause, for a period of 24 hours, was brought only in the name of a then non-party who is in privity with a party. It would only result in Doubleday and Fawcett* making the same application on the same grounds for a second time. As stated by an Iowa Court in Hoskins v. Hotel Randolph Co., 203 Iowa 1152 (1926), in commenting on a situation where a non-party had participated in the action and was now attempting to avoid an adverse judgment:

---

* Ironically, Fawcett could make the application itself since by virtue of the intervention, which is not appealable and not being appealed, it is now a party to the New York action.

> "The object of making one a party to legal proceeding is to enable him to be heard in the assertion of his rights, and if he fails to set them up, to conclude him from again litigating them . . . In substance the Otis Company is a party to the litigation. It has appeared and has been fully heard. It is concluded, and is now in court by name. The law is not a worshipper of formalities. It looks rather to the substance . . . It is not its policy to turn a litigant out of one door merely that he may re-enter at another, nor to turn him out that he may enter another court to procure the complete relief to which he is entitled, and which the court of inception has jurisdiction to grant." (emphasis added)

Likewise, no matter what procedural route the appellees should or could have followed, it is certain that the proper result is the present situation of having all parties before the New York Court where the action was first instituted and which has the closest nexus to the action. On this basis alone, the order staying the Connecticut action should be affirmed.

CONCLUSION

For the reasons stated in the main brief for defendants-appellees and for the reasons set forth herein, it is respectfully

submitted that the order appealed from be affirmed in all respects.

Respectfully submitted,

SATTERLEE & STEPHENS
Attorneys for Defendant-Appellee,
DOUBLEDAY & COMPANY, INC., and
Defendant-Intervenor-Appellee,
FAWCETT PUBLICATIONS, INC.

Of Counsel:

ROBERT M. CALLAGY
JAMES F. RITTINGER

PHILLIPS, NIZER, BENJAMIN, KRIM
& BALLON
Attorneys for Defendant-Appellee,
LOUIS NIZER

Of Counsel:

GEORGE BERGER
MARTIN STEIN

305.279

#40901

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs,

-against-

LOUIS NIZER, DOUBLEDAY & COMPANY, INC. and FAWCETT PUBLICATIONS, INC.,

Defendants.
----------X

MEMORANDUM

73 Civ. 2720 HRT

TYLER, D.J.

Defendants have moved for an order pursuant to Rules 38 and 39, F.R.Civ.P., striking plaintiffs' demand for a jury trial on the grounds that plaintiffs have waived any right to trial by jury in this action as against Nizer and Doubleday because such demand was not served within ten days after service of the last pleading relating to the claims against those defendants. Additionally, Fawcett Publications, Inc. ("Fawcett") moves for an order pursuant to Rules 38 and 39,

EXHIBIT A

F. R. Civ. P., striking plaintiffs' demand for a jury trial on the grounds that no relief against defendant Fawcett has been requested in this action and therefore the demand for jury trial as against defendant Fawcett is premature.

A party desiring trial by jury must serve a timely written demand therefor not later than ten days after the service of the last pleading directed to the issue he wishes tried to a jury. Rule 38(b), (c), F. R. Civ. P. Failure to make a timely demand for jury trial waives the right to this form of trial, Rule 38(d), F. R. Civ. P., though the court has discretion to order a jury trial despite the waiver. Rule 39(b), F. R. Civ. P.

This action was instituted against defendants Nizer and Doubleday on June 19, 1973. Said defendants served their answers to the complaint on July 25 and July 24, 1973, respectively. No further pleadings were served after July 25, 1973. Plaintiffs' demand for a jury trial was made on April 22, 1974, nine months following the last pleading of defendants Nizer and Doubleday.

Plaintiffs predicate their motion for a jury trial against all three defendants upon the intervention by Fawcett pursuant to an order entered by this court on April 3, 1974. On April 19, 1974, Fawcett

served an answer to the original complaint in this action which named only Nizer and Doubleday as defendants. It is clear that the jury demand was not timely served upon defendants Nizer and Doubleday. Since plaintiffs did not timely serve their demand for a jury, they have waived their right to a jury trial as to the issues raised in their original complaint. The extensive discovery, pretrial conferences and motions militate against the exercise of discretion in favor of a jury trial against these two defendants. As to the issues in the original complaint, the demand was untimely. Olund v. Swarthout, 459 F.2d 999 (6th Cir. 1972); Western Geophysical Co. of America v. Bolt Assoc. Inc., 440 F.2d 765, 769 (2d Cir. 1971).

It is well-settled that when a party has waived his right to a jury trial with respect to the original complaint and answer by failing to make a timely demand, amendments of the pleadings that do not change the issues do not revive this right. Western Geophysical Co. of America, supra; Roth v. Hyer, 142 F.2d 227 (5th Cir.), cert. denied, 323 U.S. 712 (1944); American Manufacturers Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 45 F.R.D. 38 (S.D.N.Y. 1968). Nor will the right be revived by the filing of a supplemental complaint. Waldo Theatre Corp. v. Dondis, 1 F.R.D. 685 (D. Me. 1941).

Although plaintiffs have interposed a timely demand for jury trial as against Fawcett, Rule 38(b), F.R.Civ.P., that demand is premature. Plaintiffs' counsel has failed to define the issues as to Fawcett by the filing of a supplemental complaint as suggested by order of this court on April 3, 1974.

In short, plaintiffs have waived their right to a jury trial against Nizer and Doubleday as to the matters raised in their complaint. The defendants' motion to strike the jury demand as to Fawcett is denied pending the filing of a supplemental complaint.

It is so ordered.

Dated: June 27, 1974

W. C. Tyler, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs, : 73 Civ. 2720 HRT

-against- :

LOUIS NIZER, DOUBLEDAY & COMPANY, INC. and FAWCETT PUBLICATIONS, INC., : AFFIDAVIT

Defendants. :

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEROY C. JACOX, being duly sworn, deposes and says:

1. I am VICE-PRESIDENT of Doubleday & Company, Inc., one of the defendants in this action.

2. Pursuant to the terms of an agreement dated April 27, 1973, Doubleday licensed the defendant, Fawcett Publications, Inc., to publish and sell the paperback edition of the work entitled THE IMPLOSION CONSPIRACY by Louis Nizer. The paperback edition was published by Fawcett in early 1974.

3. Pursuant to the terms of the aforementioned agreement and specifically paragraph 7 thereof, Doubleday is obligated to indemnify Fawcett against the claims that have been made by the plaintiffs in this action and the action which the same plaintiffs instituted in the U. S. District Court for the District of Connecticut, all of which are based on material appearing in THE IMPLOSION CONSPIRACY.

Sworn to this 21st day
of August, 1974.

Jean M. Chapman
Notary Public

JEAN M. CHAPMAN
Notary Public, State of New York
No. 31-0617715
Qualified in New York County
Commission Expires March 30, 1975

NOTICE OF ENTRY

r:

Please take notice that a

which the within is a copy, was on the

y of , 197 , duly entered and

ed in the office of the Clerk of

ated, New York, N. Y. 197 .

Yours, etc.

SATTERLEE & STEPHENS

ttorneys for

277 PARK AVENUE

Borough of Manhattan New York, N. Y. 10017

o:

ttorney for

Docket No. 74-1587

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs-Appellants,

-against-

LOUIS NIZER and DOUBLEDAY & COMPANY INC.,

Defendants-Appellees,

-and-

FAWCETT PUBLICATIONS, INC.,

Defendant-Intervenor-Appellee.

(ORIGINAL)

AFFIDAVIT

SATTERLEE & STEPHENS
Attorneys for Appellees

277 PARK AVENUE

BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10017
(AREA CODE 212) 826-6200

ADMISSION OF SERVICE

ıe and timely service of a copy of the within

hereby admitted.

ıted, New York, N. Y. 197 .

.....

Attornev for

Copy received 8/21/74 4:45 PM
Chas Ruli
Atty for Appellants

Copy Received 8/31/74 4:30 PM

Mitchell Rubin

atty for appellants